CHIP CHONG SAWMILL CO. SDN. BHD. & ORS. v. CHAI KHIUN FUI

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Yusoff J.) October 6, 1977 and January 4, 1978]

[Kuching — Federal Court Civil Appeal No. 1 of 1977]

Practice and Procedure — Admissions — Whether judgment in previous suit relevant — Whether defence bona fide — R.S.C. 1957, O. 14 r. 1, O. 25 r. 4 and O. 32 r. 6.

In this case the plaintiff was the sole proprietor of a timber company. Shin Chung Sawmill Ltd. (SCS) was the owner of forest licences issued by the Sarawak Forest Department. It was registered with the first nine defendants as shareholders. The tenth defendant was a partnership formed by Taiwanese and Malaysians including the respondent and one Tsen Tuan to acquire SCS. Tsen Tuan discovered that the respondent had acquired SCS for $180.000 with money he paid to plaintiff towards his share of the partnership. The plaintiff had used $120,000 out of the partnership moneys to pay the shareholders of SCS, the balance of $60,000 being paid from money he borrowed from his uncle. Tsen Tuan and another partner Chai Hsiun Ying brought an action against the plaintiff seeking a declaration that the respondent bought SCS as their representative and trustee. The plaintiff counterclaimed for balance of the purchase price. The learned trial judge dismissed both the claim and the counterclaim. There was no appeal from his decision. As a result of this decision, the plaintiff brought an action for specific performance and damages for breach of contract against the first nine defendants. He also applied for orders to the effect that he be given the full right to extract timber under the licences owned by SCS and that he be paid for the $60,000 he had paid by the issue of shares to him. The learned trial judge granted the orders but in order to protect the 10th defendant he ordered that Tsen Tuan or his representative be appointed inspector of SCS and that in effect the plaintiff should act subject to the approval of the inspector. In doing so the learned trial judge referred to his judgment in the earlier case and held that paragraph 10 of the defence of the defendants that the plaintiff entered into the agreement with the first nine defendants as the representative and agent of the 10th defendant was not *bona fide* and was merely set up to delay the fair trial of the action. The defendants appealed against the decision of the learned trial judge contending that the learned trial judge was wrong to make the orders but instead should have made orders for the preservation or interim custody of the subject-matter of the litigation.

Held, dismissing the appeal: in view of his finding that the plaintiff was not the trustee or agent of Tsen Tuan and Chai Hsiun Ying, and the pleadings of the shareholders, the learned judge was right to hold that paragraph 10 of the defence of the shareholders could not stand. In the circumstances he was not wrong in refusing amendments to the said paragraph on the ground that it was not *bona fide* but merely to delay the fair trial of the pending action.

Cases referred to:-

(1) *Reichel* v. *Magrath* (1889) 14 App. Cas. 665 H.L.

(2) *Montgomery* v. *Russell* (1894) 1 T.L.R. 112 C.A.

FEDERAL COURT.

Sim Teck Kui for the appellants.

Peter Ling for the respondents.

Lee Hun Hoe C.J. (Borneo): For convenience and by consent, these two appeals arising from an order dated December 14, 1976 made in respect of an action in Civil Suit No. K.25 of 1972 for specific performance and damages for breach of contract are consolidated and dealt with together as the grounds of appeal are the same.

As the background is somewhat complex, it is necessary to set out certain facts. Plaintiff is the sole proprietor of Hock Thye Timber Co. Miri. Tsen Tuan is a Taiwanese businessman. Shin Chong Sawmill Co. Ltd. (referred to as SCS) was registered under the Sarawak Companies Ordinance (Cap. 65) with the first nine defendants as shareholders. SCS owns a forest concession and holds two annual renewal forest licences Nos. T/0051 and T/0055 issued by the Sarawak Forest Department. The 10th defendant, Taiwan Malaysia Timber Co., is a partnership formed by Taiwanese and Malaysians including plaintiff and Tsen Tuan to acquire SCS. It came in as a defendant by leave of court. Through his firm, plaintiff obtained an option to purchase SCS for M$180,000. He made several visits to Taiwan and succeeded in getting certain Taiwanese, particularly Tsen Tuan, interested in the forest concession. Apparently, there were discussions to form a partnership to acquire SCS for US$180,000. On September 25, 1969 plaintiff entered into a sale and purchase agreement with the shareholders for the transfer of shares together with all contractual rights to extract timber in the forest concession of SCS for M$180,000. Payments were to be made by instalments as follows: —

i) $10,000 on or before 30.9.69.
ii) $50,000 on or before 31.10.69.
iii) $60,000 on or before 31.1.70.
iv) $60,000 on or before 30.4.70.

In October 1969 Tsen Tuan and another Taiwanese Chai Hsiun Ying came to Miri and the Taiwan Malaysia Timber Co. was formed and registered. A partnership agreement was signed by the parties on October 18, 1969 and registered on October 31, 1969. As a major shareholder, Tsen Tuan was elected chairman. Clause 1 of the agreement provides that the partnership "shall purchase all the assets and forest licences of Shin Chong Sawmill Co. Ltd. of Miri at the price of one hundred eighty thousand American dollars." Clause 2 says that "the purchase price for Shin Chong Sawmill Co. Ltd. will be paid by 3 instalments by the company." By clause 3 plaintiff was temporarily appointed as the representative of the partnership to purchase all shares in SCS and on payment of all instalments of purchase price the shares in SCS are to be transferred to the partnership. Clause 8 states as follows: —

"From the date of this agreement all partners shall try their very best to help promote the business of the company. If it is discovered that anyone has been working for his own ends, or indulging in corruption or malpractices detrimental to the interest of the company, his shares shall be forfeited as punishment."

Subsequently, Tsen Tuan discovered that plaintiff had in fact acquired SCS for M$180,000 with money he paid to plaintiff towards his share of the partnership. As a result, he and Chai Hsiun Ying sued plaintiff in Civil Suit No. K.200 of 1970 seeking a declaration that plaintiff bought SCS as their representative and trustee. Plaintiff counterclaimed for balance of the purchase price. The learned judge dismissed both the claim and the counterclaim. There was no appeal against his decision. The learned judge made certain findings. He found that plaintiff obtained an option to purchase SCS for M$180,000 and succeeded in getting 10th defendant to buy SCS for US$180,000; that Tsen Tuan paid to 10th defendant US$72,011.63 and that out of this sum plaintiff used M$120,000 to pay the shareholders of SCS; that apart from Tsen

Tuan none of the partners had paid up his share of capital to the partnership; that plaintiff paid M$60,000 to the shareholders of SCS from money he had borrowed from his uncle in Kuching; that Chai Hsiun Ying conspired with plaintiff and his father to profit from the sale of shares of SCS to the partnership and that he threatened to expose the scheme and plaintiff paid him off with money paid by Tsen Tuan to keep him quiet.

The shareholders of SCS do not dispute that they have been paid M$180,000 by plaintiff. By their defence they contend that the forest licences are not assignable without prior consent of the Forest Officer and that plaintiff would have to obtain such consent before the transfer and that no such consent has been obtained. Under section 2(2) of the Forest Ordinance (Cap. 126) the consent of the Conservator of Forests would be required for the transfer of the controlling interest of SCS to plaintiff or any other person. Paragraph 10 of their defence reads: —

"Further and in the alternative the defendants say that the plaintiff made the said agreement as agent of and trustee for Messrs. Tsen Tuan and Chai Hsiun Ying both of Taiwan who have instituted a suit against the plaintiff in the High Court in Borneo vide Civil Suit No. K.200/1970 in reference to the purchase of the defendants' shares in Shin Chong Sawmill Co. Ltd. and the defendants have been instructed by the Messrs Tsen Tuan and Chai Hsiun Ying to withhold all transfers of their shares to anybody pending the outcome of the said case No. K.200/1970."

As a result of the decision of the learned judge in Civil Suit No. K.200 of 1970, particularly his findings that plaintiff was not the representative or trustee of Tsen Tuan and Chai Hsiun Ying and that plaintiff paid M$60,000 to shareholders of SCS from money he borrowed from his uncle, plaintiff by notice of motion dated November 12, 1976 applied for the following orders: —

"(1) That the first defendant Chip Chong Sawmill Co. Sdn. Bhd., and the fifth defendant Yong Muy shall execute transfers of 44,999 shares and 15,000 shares respectively together with 1 share in the name of the fourth defendant Yong Khet Bang in favour of the plaintiff;

(2) That the plaintiff be given the full right to extract timber from the forest concessions under Licences No. T/0051 and T/0055 until the trial of the case subject to the plaintiff to keep proper accounts in respect of such extraction;

(3) That the defendants shall hand over the documents of permit to enter Coupe No. 75/76, the Forest Timber Licences No. T/0051 and T/0055 the Common Seal and the rubber stamps of the company to the plaintiff until the trial of the case;

(4) That the plaintiff to be appointed as Director and General Manager of the Company;

(5) Costs of this application be costs in the cause."

In dealing with the motion the learned judge referred to his judgment in Civil Suit No. K.200 of 1970. Clause 4 of the sale and purchase agreement provides that: —

"The transferee (Chai Khiun Fui), as from the November 1, 1969, shall have full control and management of the said Company and that all debts due to and owing by the said company as from this date shall be borne by the transferee."

In the light of his finding that plaintiff had made use of only M$120,000 of the partnership money to pay the shareholders, the learned judge held that it was wrong to allow plaintiff to have full control of SCS. As this sum covers two-thirds of the total shares of SCS and by virtue of the provisions of section 11 of the Sarawak Partnership Ordinance (Cap. 11), the learned judge considered that to that extent at least the interest of the 10th defendant should be protected pending the hearing of Civil Suit No. K.25 of 1972. Thus, he granted the orders sought but imposed these conditions: —

"(1) that Tsen Tuan or his representative be appointed as inspector of Shin Chong Sawmill Co. Sdn. Bhd. and that all acts of the plaintiff, Chai Khiun Fui, as General Manager or shareholder of the said Shin Chong Sawmill Co. Sdn. Bhd., must be approved by the inspector;

(2) that no bank account of Shin Chong Sawmill Co. Sdn. Bhd., shall be operated without the written approval of the inspector and that all cheques issued by the said sawmill must be countersigned by the inspector;

(3) liberty to apply."

Defendants submitted the learned judge was wrong to make the orders. The motion was made under O.14 r.1, O.25 r.4 and O.32 r.6. The proper course should have been to make application under O.51 r.1 for preservation or interim custody of the subject matter of the litigation. Defendants contended that plaintiff never prayed for any part of the defence to be struck out. Also, the learned judge had not done so. Therefore, the defence must be deemed to be *bona fide* and on merits. Paragraph 6 of the defence of 10th defendant reads: —

"The tenth defendant admit the agreement of September 25, 1969 but contend that the plaintiff entered into the same with the first nine defendants as the representative and agent of the tenth defendant."

Clearly, the learned judge did not rely on O.14 r.1 and O.25 r.4 but O.32 r.1 which he dealt with in some detail. However, the learned judge stated that although the judgment in Civil Suit No. K.200 of 1970 was not binding, it was relevant "to determine whether the above paragraph 6 is *bona fide* or merely set up to delay the trial of the action." He came to the conclusion in that case that plaintiff entered into the sale and purchase agreement dated September 25, 1969 with the shareholders in his own personal capacity and, therefore, paragraph 6 above was not *bona* fide but merely set up to delay the fair trial of the action. The contention of defendants is that as the said judgment is not binding, it is inadmissible as evidence and irrelevant to determine whether paragraph 6 above is *bona fide* or not. The main issue in that case was whether plaintiff was the representative and trustee of Tsen Tuan and Chai Hsiun Ying. The learned judge held that plaintiff was not. I should mention that the partnership agreement was signed and registered long after plaintiff had entered into the sale and purchase agreement with the shareholders. Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process. For instance, in *Reichel* v. *Magrath*[1] though the defendant was not, strictly speaking, estopped by *res judicata* the parties not being the same, the defence was struck out, and judgment given for the plaintiff, not under O.25 r.4 but in the exercise of the inherent jurisdiction. In *Montgomery* v.

Russell[2] the case again was not strictly one of estoppel (because the two libel actions were not in respect of the same defamatory matter) nor did it come within the purview of O.25 r.4 but nevertheless the second action was dismissed as an abuse of the process.

No one, least of all the learned judge, questions the principle that the finding of facts arrived at on the evidence by the court in one case is not evidence of the same facts in another case where the parties are not the same. However, as Turner on "The Doctrine of Res Judicata", 2nd Edition, paragraph 240, page 200 under the heading of persons affected who are not parties, says: —

"It may happen that one who is not a party to a suit at all may in the event find his rights determined, or limited at least to some extent, by the result of litigation between other parties. But this is not the result of estoppel; it is merely a consequence of his being compelled in circumstances of the particular case to take matters as he finds them."

The object of the admissibility of the judgment is to enable the court to give effect to the adjective law or law of procedure. Hence, the learned judge said that though the judgment was not binding on the parties, it was relevant to the application having regard to the defence. Even counsel for defendants conceded that it was relevant. In fact, it was raised in their pleadings. Furthermore, by consent of the parties the whole record of proceedings of Civil Suit No. K.200 of 1970 was put in and became relevant in the application to amend the defence (see page 56 of Appeal Record of Federal Court Civil Appeal No. 2 of 1977). The learned judge seems to take the view that the most 10th defendant could claim is two-thirds of the total shares of SCS under clause 8 of the partnership agreement. That is why he came to the conclusion that paragraph 6 of the defence of 10th defendant is not *bona fide* but merely set up to delay the fair trial of the action. Bearing in mind that the partnership agreement did not even exist, when the sale and purchase agreement was executed, it is difficult to see how defendants could establish that plaintiff was a representative and agent of the partnership to purchase SCS for M$180,000. Of course there is nothing to prevent them having this point decided on merits at the hearing of Civil Suit No. K.25 of 1972. Apart from this other issues will have to be decided in that suit. In his reply to the defence of 10th defendant he says he was the representative to buy SCS for US$180,000 under the partnership agreement.

Under O.32 r.6 any party may at any stage of a cause or matter where admissions of facts have been made either in the pleadings or otherwise apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties. It is the contention of defendants that they have never admitted in their pleadings that plaintiff is entitled to any share in SCS. The mere fact that shareholders have admitted entering into a sale and purchase agreement dated September 25, 1969 with plaintiff and being paid in full by plaintiff does not warrant the making of the order which the learned judge made. The further contention of defendants is that plaintiff is just a trustee of the partnership and under clause 8 of the partnership agreement plaintiff's shares would be forfeited. The shares to be forfeited refer to his partnership shares. It does not mean his shares in SCS. On the other hand, plaintiff admitted the existence of the partnership but contended that it was void. It is true that the main issue is whether the partnership or the plaintiff is entitled to the whole or part of the shares in SCS. It is of no concern of the shareholders whether the partnership or the plaintiff would eventually own the SCS as they have received payment in full. But, as the plaintiff in his supplementary affidavit pointed out he entered the sale and purchase agreement on September 25, 1969 in his personal capacity and at the time the partnership agreement was not in existence. One may feel sorry for Tsen Tuan for trusting plaintiff with so much money when plaintiff is beyond doubt a man of "sharp practice." Plaintiff is a man who would make use of money not his own without scruple for his own benefit. But then the law does not protect a fool who parts with his money so easily.

It is a primary principle of evidence that a person is not bound by a judgment unless he is a party to it. The rights of plaintiff and the partnership to the shares in SCS will have to be decided in Civil Suit No. K.25 of 1972. Defendants say it is important to maintain the *status quo* pending the trial of that suit and the proper course would be for plaintiff to make application under O.51 r.1. The learned judge has considered the matter carefully and came to the conclusion that plaintiff was entitled to ask for an order for the transfer of 60,000 shares of SCS in view of paragraphs 9 and 10 of the defence of the shareholders. Paragraph 10 has been stated previously. Paragraph 9 reads: —

"The defendants have always been willing and ready to transfer all their shares in the Shin Chong Sawmill Co. Ltd. to the plaintiff as soon as the plaintiff has obtained such consent from the Conservator."

As the 10th defendant has pleaded clause 8 of the partnership agreement the learned judge has, quite properly, made an order that the 60,000 shares of plaintiff shall not be transferred, charged, pledged or dealt with in any way whatsoever pending the determination of clause 8 or without an order of the High Court. In so far as 10th defendant is concerned, all is not lost although the 60,000 shares are to be transferred to plaintiff.

The matter would be different if the 10th defendant was not made a party. The plaintiff pointed out, quite rightly, that when the motion was taken out the fact that plaintiff was not the trustee and agent of Tsen Tuan and Chai Hsiun Ying was known. Hence, the learned judge, in giving leave to 10th defendant to come in as a party (see pages 66 and 67 of Federal Court Civil Appeal No. 1 of 1977) states: —

"But for the findings in my judgment in C.S. No. K. 200/70 Taiwan Malaysia Timber Co., Miri, Sarawak would not have been made a party to these proceedings thereby giving the partnership the opportunity to intervene in this action. That was how Taiwan Malaysia Timber Co., Miri, Sarawak came about to be added as the tenth defendant."

The general principle of law is that the finding of facts in one case is not binding on another case unless parties have agreed. Defendants say they do

not dispute the formation of the partnership and the payment of money by Tsen Tuan. In his affidavit dated November 30, 1976 in paragraph 3 Sim Teck Kui affirmed (see page 47 of Federal Court Civil Appeal No. K.1 of 1977) as follows:

"(3) I crave leave to refer to the judgment in High Court Civil Suit No. K.200 of 1970 dated October 4, 1976 which is related to the present case in which the learned judge found as a fact that M$120,000 of the total purchase price for the shares in Shin Chong Sawmill Sdn. Bhd., was paid with the tenth defendants' capital fund and that the balance in the sum of M$60,000 was raised by the plaintiff from various persons. That does not necessarily mean that the plaintiff is entitled to one third of the shares in Shin Chong Sawmill Sdn. Bhd."

Reference was also made to the Civil Suit No. K.200 of 1970 in paragraph 10 of the defence of the shareholders which was stated earlier on. Further, counsel for defendants in his address (see page 57 of Federal Court Civil Appeal No. K.1 of 1977) clearly submitted that certain findings of facts in Civil Suit No. K.200 of 1970 which are relevant to this suit might be adopted. In fact, in applying for amendment to paragraph 10 of the defence of the shareholders, counsel also referred to the finding in Civil Suit No. K.200 of 1970 that plaintiff was not the agent of Tsen Tuan and Chai Hsiun Ying and stated categorically that he was relying on the record of proceedings in that civil suit. (See page 54 of Federal Court Civil Appeal No. 2 of 1977).

The 10th defendant was never a party to the sale and purchase agreement dated September 25, 1969 which was between plaintiff and the shareholders and executed before the existence of the partnership agreement. The matter would have been less complicated if the 10th defendant was also made a plaintiff in Civil Suit No. K.200 of 1970 for then whoever has the right to the shares of SCS can be decided upon. In the exercise of his discretion the learned judge has decided to allow 10th defendant to intervene and to invoke clause 8 of the partnership agreement. This is yet another matter which will have to be decided in the pending suit. The question of partnership was never raised by the shareholders. In view of his finding that plaintiff was not the trustee and agent of Tsen Tuan and Chai Hsiun Ying, and the pleadings of the shareholders, the learned judge was, with respect, right to hold that paragraph 10 of the defence of the shareholders could not stand. In the circumstances, I cannot say he was wrong to refuse amendments to the said paragraph on the ground that it was not *bona fide* but merely to delay the fair trial of the pending suit. I would order an early trial of the suit.

For reasons given, I would dismiss the appeal. Costs in the cause.

Ong Hock Sim F.J. and **Yusoff J.** concurred.

Solicitors: *Yong & Co.; Ee & Lim.*

LLOYD TRIESTINO SOCIETA v. CHOCOLATE PRODUCTS (MALAYSIA) SDN. BHD.

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 9, 1977 and January 10, 1978]

[Penang — Federal Court Civil Appeal No. 161 of 1977]

Practice and Procedure — Renewal of Writ — Application made before expiry of twelve months from issue of writ — Reasons for renewal — R.S.C. 1957, O. 8 r. 1.

The respondent had taken out a writ against the appellant but the writ had not been served within twelve months of the issue. Before the expiry of the twelve months period the respondents applied *ex parte* for renewal of the writ and an order for renewal was made. The appellants applied to set aside the order for renewal and the service of the writ but this application was dismissed by the Senior Assistant Registrar whose decision was upheld on appeal in the High Court. The appellant appealed.

Held, allowing the appeal: (1) the court had jurisdiction to renew the writ in this case but even if the application is made within twelve months of the date of issue the jurisdiction should not be exercised in all cases and indiscriminately but only where there are good reasons to excuse the delay in service;

(2) in this case no reason had been advanced for the exercise of the court's discretion in renewing the writ and the discretion ought not to have been exercised.

Cases referred to:-

(1) *Hume* v. *Somerten* (1890) 25 Q.B.D. 239.
(2) *Doyle* v. *Kaufman* (1877) 3 Q.B.D. 7.
(3) *Hewlett* v. *Barr* [1891] 1 Q.B. 98.
(4) *Sheldon* v. *Brown Bayley's Steel Works Ltd. and Dawnays Ltd.* (1853) 2 Q.B. 392.
(5) *Battersby & Ors.* v. *Anglo-American Oil Co. Ltd. & Ors.* [1945] 1 K.B. 23.
(6) *The Espanoleto* [1920] P. 223.
(7) *Firm of T.A.R. CT.* v. *Firm of S.N.S. SR.N.* [1954] M.L.J. 72 C.A.
(8) *E. Ltd.* v. *C. & Anor.* [1959] 1 W.L.R. 692.
(9) *Smalpage* v. *Tonge* (1886) 17 Q.B.D. 644.
(10) *Holman* v. *George Elliot & Co. Ltd.* [1944] K.B. 591.
(11) *New Ching Kee* v. *Lim Ser Hock* [1975] 2 M.L.J. 183.

FEDERAL COURT.

Lim Kean Chye for the appellants.

Charles Ong for the respondents.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal clearly involves the proper construction and application of Order 8 rule 1 Rules of the Supreme Court. In its pertinent parts, it reads as follows:

"1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ... and a writ of summons so renewed shall remain in force and be available to prevent the operation of any written law, whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons."

As has been observed in *Hume* v. *Somerton*,[1] this Order is a complete code on the subject.